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FM AMEMBASSY MEXICO

TO RUEHC/SECSTATE WASHDC PRIORITY 0611

INFO RUEHXC/ALL US CONSULATES IN MEXICO COLLECTIVE PRIORITY

RUEHGV/USMISSION GENEVA PRIORITY 1015

RUCPDO/DEPT OF COMMERCE WASHDC PRIORITY

RUEAHLA/DEPT OF HOMELAND SECURITY PRIORITY

RHMFUU/DEPT OF JUSTICE WASHINGTON DC PRIORITY

RUEATRS/DEPT OF TREASURY WASHDC PRIORITY

RHEHNSC/NSC WASHDC PRIORITY

UNCLAS SECTION 01 OF 05 MEXICO 000512

SIPDIS

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STATE FOR EEB/IPE JENNIFER BOGER

STATE PASS USTR FOR JENNIFERCHOE GROVES

COMMERCE FOR ITA/MAC/OIPR CASSIE PETERS

E.O. 12958: N/A

TAGS: [KIPR](#) [ETRD](#) [ECON](#)

SUBJECT: MISSION INPUT ON 2008 SPECIAL 301 REVIEW: MEXICO

REF: SECSTATE 9475

¶1. (U) Summary: Mission recommends that Mexico remain on the Special 301 Watch List for 2008. In the first year of the Calderon administration, there have been significant advances in a number of areas of concern highlighted in last year's report, with little or no progress on others. The advances registered have not succeeded in rolling back the widespread commercial piracy and counterfeiting that continue to plague the Mexican market, but they do provide momentum to an increasingly comprehensive approach to protecting intellectual property rights (IPR) here that we believe will bear concrete results over the medium and long-term. Embassy and constituent posts will continue to monitor and encourage Mexican efforts to strengthen enforcement and safeguard the interests of right-holders. At the same time, we expect to continue our robust cooperation with Mexico on IPR issues in the multilateral and regional arenas, and see this cooperation as exerting a positive influence on domestic IPR protection. End summary.

Overall Assessment of IPR Climate

¶2. (U) Mexico continues to suffer from rampant and largely undeterred commercial IPR infringement that causes huge losses to Mexican, U.S., and third country IP right-holders. The federal government and a small number of state and municipal governments have significantly ramped up their IPR protection efforts and intra-governmental coordination this past year, including enforcement actions. Cooperation between government, but legislative loopholes, a cumbersome judiciary process, continuing lack of cooperation from many states and municipalities, and a widespread cultural acceptance of illegal commerce continue to hinder effective deterrence of piracy and counterfeiting. We believe that inclusion of Mexico on the Watch List would clearly demonstrate the serious ongoing nature of the problems it faces, while not moving Mexico to the Priority Watch List would demonstrate our cognizance of the impressive efforts that Mexico is making to better protect IPR.

¶3. (U) On the international front, Mexico continues to play a positive role. It has spoken up against attempts to undermine intellectual property rights in global health fora, was the first developing country to agree to being an initial negotiating party to the Anti-Counterfeiting Trade Agreement, and has actively pushed ahead the IPR Working Group under the trilateral Security and Prosperity Partnership of North

America (SPP). President Bush and the leaders of Mexico and Canada announced an SPP IPR Action Plan at their August 2007 meeting in Montebello, Canada. The plan has three broad categories of activity: detection and deterrence; public education and outreach; and measuring piracy. The three governments are actively pursuing specific action items under all three of these broad categories.

Scorecard on Areas of Concern from 2007

¶4. (U) In last year's report, we identified a number of areas where we believed Mexico could take action to improve its situation. Here is how we grade its performance in those areas:

-- A bill to grant ex officio powers to law enforcement officials to pursue IPR crimes passed the Senate in April 2007 but has not been voted on in the Chamber of Deputies. A Mexican congressional delegation that visited Washington February 11-13 predicted that the bill would be passed into law before the current legislative session ends in April ¶2008. We will continue to lobby on behalf of this legislation.

-- We have had success in including Mexican administrative and penal judges in several training and exchange programs over the past year. In November 2007, the Embassy, the Mexican judiciary, and the Mexican Institute of Industrial Property (IMPI - rough equivalent of U.S. PTO) jointly organized a two-day seminar on trademarks. U.S. PTO arranged for a U.S. federal district court judge, a PTO administrative judge from the Trademark Trial and Appeal Board, and a U.S.

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PTO attorney-advisor to speak at this event, in which dozens of Mexican administrative judges, IMPI officials, and private sector attorneys participated. In December 2007, two Mexican federal penal judges attended a workshop on inter-agency and inter-sectorial coordination in combating piracy and counterfeiting held in Monterrey, Mexico, where they exchanged views on why criminal convictions are so hard to obtain with U.S. and Mexican IPR prosecutors. Four Mexican federal judges (both administrative and penal) are planning to participate in a U.S. PTO Global IP Academy course for judges scheduled for early March 2008. Perhaps the clearest sign of growing judicial interest in IPR is the international conference being organized by the Mexican judiciary in late February 2008 in Cancun, Mexico. Judges, prosecutors, right-holders, and IPR officials have been invited from Canada, the United States, Europe, and Latin America to participate in a three-day forum covering the whole range of legal issues related to copyrights, trademarks, patents and data protection, and enforcement. The President of Mexico's Supreme Court, Mexico's Prosecutor General, the head of IMPI, and a large number of Mexican federal administrative and penal judges are expected to attend, as are two U.S. federal district court judges and experts from the U.S. Copyright Office, U.S. PTO, and the Department of Commerce. This surge in judicial exchanges has not eliminated the serious obstacles to effective administrative and penal IPR enforcement posed by Mexico's justice system, but has created unprecedented dialogue between Mexican judges, enforcement officials, and right-holders. This dialogue is identifying the key obstacles and helping to build political support to eliminate them.

-- Regarding tapping into existing law enforcement resources and authorities that target organized crime, the special IPR unit in the Office of the Prosecutor General of the Republic (PGR - rough equivalent of the Department of Justice) has improved its intelligence targeting of pirating networks but still has not made use of organized crime authorities to seek stiffer penalties on commercial infringers.

-- The State of Mexico and the Municipality of Toluca signed

agreements with Mexico's federal government (PGR and IMPI are both actively involved) and right-holders to cooperate in combating piracy and promoting legitimate commerce in 2007. Cooperation has improved drastically with those governments. Private sector sources say that a number of other state and municipal-level agreements will likely be signed in 2008, including with the State of Morelos and the municipality of Ciudad Juarez. The government of Mexico City has not signed such an agreement, but has worked closely with federal law enforcement officials in attacking all forms of illegal commerce in the city center. The government of the State of Jalisco entered into an agreement with IMPI and the Business Software Alliance (BSA) to "Clean House," a program under which IMPI and BSA will help ensure that all software being used in state government offices is licensed. Most Mexican states and cities remain relatively unengaged in the fight against IPR infringement. But 2007 saw a sea change from from zero prior involvement of states and cities to a situation in which a number of very prominent sub-federal governments are now actively committed to the protection of IPR, with more poised to follow their lead, motivated at least in part by the competition to attract high quality foreign investment.

-- We have not heard from either industry or the GoM on purchases of infringing medicines by state-run health institutions. Patent linkage has been respected in 2007, though a number of cases from 2006 in which the health authorities granted registrations to generic versions of patented drugs remain unresolved. Data protection will be discussed below.

-- The Mission (CBP, ICE, and Economic Section), together with the Department of Justice, organized two large-scale capacity-building events for Mexican customs officials in the past year, first at the Port of Veracruz in July 2007 and more recently at the Port of Manzanillo in February 2008. In both cases, PGR and IPMI officials, as well as private sector experts, formed part of the faculty and stressed the importance of stopping fakes at the port of entry and the need for interagency cooperation to make this happen given

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Mexican Customs' inability to take action on its own. Officials from other ports attended both trainings, which we believe were very successful. For example, the Port of Lazaro Cardenas, the second-largest on the Pacific Coast, had never detained a shipment of IPR-infringing goods before 2007, but since the Veracruz training (attended by several customs officers from Lazaro Cardenas), seven shipments have been stopped and turned over to either the PGR or IMPI for further enforcement action, including arrests.

-- The Mexican Congress is expected to act on a major initiative to overhaul the entire Mexican penal justice system early this year that will more fully empower police and prosecutors and streamline the judicial process while strengthening the civil rights of the accused. If passed into law in its present form, this could significantly improve all forms of criminal enforcement in Mexico.

Specific Areas of Concern

15. (U) This section adopts the format for specific areas of concern used in reftel.

1A. Notorious Markets: Informal markets throughout Mexico feature vendors blatantly selling pirated audio-visual materials and counterfeit name-brand goods. In Mexico City, Tepito remains the main warehousing and distribution center for infringing products, and hosts scores of retail stalls to boot. Other markets of particularly ill repute include the Plaza Meave, the Eje Central, Lomas Verdes, and the Pericoapa Bazaar in Mexico City, San Juan de Dios in Guadalajara, Simitrio-La Cuchilla in Puebla, and the Pulgas of Monterrey. Authorities do conduct raids in these markets, but usually at

night to avoid violent confrontations that daylight raids can provoke. Some media reports indicate that the elevated pace of government raids, confiscations, and seizures of real estate in Tepito might be forcing some illegal vendors to migrate to La Cuchilla market in Puebla, but Tepito still remains the principal nexus of Mexico's black market.

B. Optical Media Piracy: Piracy of movies, music, video games and business software is rampant in Mexico. According to the International Intellectual Property Alliance (IIPA), U.S. copyright industries (not including the film industry) suffered losses to piracy of more than \$1.2 billion in 2007. MPAA estimates that its member companies lost \$483 million last year in Mexico, and other film companies (foreign and domestic) another \$100-200 million. Mexico continues to import hundreds of millions of blank optical media units in excess of its legitimate demand.

C. Use/Procurement of Government Software: The federal government generally purchases and uses legitimate software. As noted in para 4 above, in 2007 the Business Software Alliance (BSA), IMPI, and the government of the State of Jalisco launched an initiative to "Clean House" by ensuring that all software used in state government offices was licensed. Mission Mexico is working with IMPI and BSA to get other state and city governments to agree to participate in "Cleaning House" programs.

D. TRIPS Implementation, NAFTA Implementation and Other IP-Related Issues: As reported last year, Mexican law is largely in compliance with TRIPS and NAFTA obligations, with data protection (see below) standing out as a possible exception. With regard to implementation of its own laws, an argument could be made that the application of deterrent penalties as required under TRIPS Article 61 and NAFTA 1717 are the exception rather than the rule.

E. Data Protection: Neither Mexican law nor the relevant health regulations provide clear rules that either define or mandate data protection. Mexican officials argue that NAFTA 1711 (Trade Secrets) is self-executing, thus obviating the need for further legislative or regulatory action. Over the course of the past year, the Mission, working with the research-and-development pharmaceutical industry and colleagues from the European Commission's Mission in Mexico, has pressed Mexican health, trade, and IPR officials to consider including clear and NAFTA-consistent data protection rules in amendments to Mexico's food and drug regulations. Mexican officials have requested that industry first

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demonstrate the current system is not working by presenting cases in which test data used for drug registration has subsequently been used by unauthorized third parties within the five-year term of data protection provided by NAFTA. We are waiting for industry representatives to provide concrete examples to this effect.

F. Production, Import and Export of Counterfeit Goods: As mentioned in sub-paragraph B above, a huge volume of blank optical discs enters Mexico each year, the vast majority of which is used to burn pirated copies of movies, music, or software. The GoM has created more refined tariff lines to better differentiate and track these incoming shipments. Industry and government experts suspect that a large percentage of the imported discs enter Mexico without paying the appropriate import tariffs due to either mis-classification (i.e., declaring higher-value DVDs to be lower-value CDs) or claiming a false country of origin (i.e., claiming to be U.S. products that owe no tariffs due to NAFTA when in fact they are products of Asian countries). Mission Mexico (led by CBP and ICE) is working with its GoM counterparts to train customs officials to distinguish among the various types of optical discs and to coordinate efforts to combat contraband trade that falsely claims U.S. origin to avoid paying Mexican tariffs. With regard to the import of

pirated or counterfeit goods, customs officials can hold suspect shipments for a very limited time (usually 48 hours) on their own authority. After that they need to receive an order from either PGR or IMPI to seize the merchandise in question. PGR and IMPI, in turn, would need to obtain a formal complaint from the aggrieved right-holder before issuing such an order. As mentioned in para 4 above, Mission trainings of Mexican customs officials have led to better coordination among Mexican customs, PGR, IMPI, and right-holders, though greater latitude for customs to act on its own authority would be helpful.

G. Enforcement: The number of raids, arrests, indictments, and convictions of pirates and counterfeiters rose from 2006 to 2007, reflecting the efforts of PGR and IMPI to strengthen enforcement. Criminal indictments by PGR's specialized IPR unit went from 158 to 166 in that period. Even so, only five persons were convicted in penal courts in 2007 -- better than the two convicted in 2006 (last year we mistakenly reported four convictions) but still far too few to deter this sort of criminal behavior. On seizures, PGR actually saw its total quantity of confiscated articles drop, but argues that it began to concentrate more on quality than quantity last year, pointing out that the almost 8,000 disc burners and sixteen buildings seized in 2007 were record highs that translated into significant economic blows against commercial-scale infringers. PGR has yet to utilize its authority to apply much tougher organized crime penalties on pirates. This issue was raised at the 2007 Senior Law Enforcement Plenary between PGR, the Department of Justice, and other U.S. law enforcement agencies. Likewise, IMPI has stepped up its administrative enforcement actions but also remains hampered by low maximum fines it can impose and a legal process that allows infringers to file repeated injunctions that stave off penalties for months or even years. A number of legislative reforms that would promote more effective criminal and administrative enforcement include: ex officio authority for law enforcement; removing IMPI's administrative enforcement regime from under the jurisdiction of the Federal Law of Administrative Procedures (which slows down the administrative enforcement process); increasing maximum penalties; outlawing cam-corders in theaters; and outlawing all trade in devices for circumventing technological protection measures.

H. Treaties: Mexico's National Copyright Institute (INDAUTOR) is conducting a review of whether Mexican law is in compliance with the WIPO Internet Treaties it has ratified. INDAUTOR has not set a timeline for completion of its review.

I. Internet Piracy: The Internet is fast becoming a major threat to owners of intellectual property rights in Mexico. PGR's specialized IPR unit has issued one indictment against a man who was selling infringing movies via the Internet, and has requested training from Department of Justice cyber-crime experts to refine its ability to detect and prosecute this

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kind of piracy. IMPI has made over 500 inspection visits to cyber-cafes suspected of abetting Internet piracy in conjunction with the Mexican music industry to warn owners of potential legal liability and to provide mechanisms for blocking access to problem sites. The industry has begun to file civil suits against Internet users who have been egregious downloaders or uploaders of songs last year -- the results of these legal actions remain to be seen. Mexican law does not mandate ISP responsibility, but a number of industry groups are lobbying the Mexican Congress to pass legislation to address this gap. Three Mexican legislators who visited Washington in February 2008 expressed great interest in the way the U.S. Digital Millennium Copyright Act handles this issue.

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